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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 178

JOHN RUSSELL CROOKER, JR.,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

This is Petitioner's Reply Brief in the United States Supreme Court in the matter of the order of this Court granting certiorari to the California Supreme Court in *People* v. *Crooker*, 47 Cal.2d 348, 303 P.2d 753. (*Crooker* v. *California*, 354 U.S. 908, 77 S.Ct. 1300.)

This Court granted certiorari limited to the two questions as follows:

(1) Was the Defendant Denied Due Process of Law by the Refusal of the Investigation Officers to Allow Him to Consult With an Attorney Upon Demand Being Made to Do So While He Was in Custody?

(2) Was the Defendant Denied Due Process by the Admission Into Evidence of a Confession Which Was Taken From Him While in Custody and After He Had Been in Such Custody for Fourteen Hours and Had Not Been Allowed to Consult With His Attorney?

Preliminary Statement

Petitioner was convicted in the Los Angeles Superior Court of the murder of Norma T. McCauley on July 5, 1955. Both Petitioner's Opening Brief and Respondent's Answering Brief set forth extended Statements of Fact. In addition, Petitioner makes considerable reference to pertinent facts in this Reply. Thus, in the interest of brevity, a Factual Statement is not repeated here.

Argument

In Petitioner's Opening Brief, filed herein, Argument was divided in accordance with the questions presented in the granting of certiorari in this matter. Respondent's Answering Brief also presents Argument in two parts, based upon these two questions. In this Reply, Petitioner respectfully presents his position before this Court in two contentions, based upon Respondent's contentions and the questions presented, as follows:

(1) This Defendant Was Denied Due Process Under the Federal and State Constitutions by Refusal of Investigating Officers to Allow Him to Consult With an Attorney Upon Request Being Made to Do So While He Was in Custody and Being Interrogated by the Officers:

The contention that a criminal proceedings is rendered void if it follows upon a deprivation of a defendant's con-

stitutional right of assistance of counsel is not novel. This Court has so held in cases originating in both state and federal jurisdictions. (*House* v. *Mayo*, 324 U.S. 42, 65 S.Ct. 517; *Glasser* v. *United States*, 315 U.S. 60, 62 S.Ct. 467; *Johnson* v. *Zerbst*, 304 U.S. 458, 55 S.Ct. 1019.)

As this Court said in *Powell* v. *Alabama*, 287 U.S. 45, 53 S.Ct. 55, a defendant "*requires the guiding hand of counsel at every step in the proceedings against him.*" (Court's italics.)

Respondent asserts that the refusal of Petitioner's requested constitutional right of counsel presents a novel feature in that this deprivation occurred during the investigative stage of the proceedings (Respondent's Brief, p. 55). It is axiomatic that a defendant in a criminal case is entitled to counsel at all stages of proceeding. Respondent does not contend that this right does not extend to the investigative stages of the case and there is no question but what this is a time when a prisoner may be more in need of counsel than at any stage of the case.

The significant feature, however, is, in these admitted facts, that Petitioner did, himself, request to call an attorney, and was told by the police that he could only do so after their investigation was over (Transcript of Record, p. 83); and that this deprivation was carried forward throughout every step of the proceedings, through the admission and use in evidence of an alleged confession taken in such circumstances, as virtually the sole basis of conviction. These facts are *not* in any substantial or real conflict.

Thus, the distinguishing feature of this case is in this admitted request and refusal of counsel and the fact that the request was during the investigative stage of the proceedings made no difference.

This case does not present a mere coincidental absence of counsel, as an incident of Petitioner's detention. He expressed his need of assistance of counsel, as shown by his request to call an attorney. Respondent, however, relies entirely upon cases wherein defendants neither requested counsel, nor were expressly refused the right to call and confer with an attorney. (E.g., *Lisenba* v. *California*, 314 U.S. 219, 62 S.Ct. 280; *Stroble* v. *California*, 343 U.S. 181, 72 S.Ct. 599. See: Justice Carter's dissent to the majority opinion in the instant case (Transcript of Record, pp. 720-722).)

Petitioner submits that his contention that such a deprivation of his requested right of counsel constitutes a denial of due process is also far from novel in its implications. For this Court to uphold this contention is strictly within the letter and spirit of the historic right of an accused to the effective assistance of counsel in all stages of the proceedings against him.

This right of counsel is not a discretionary or perfunctory provision in our concept of justice. Not only assistance, but effective assistance of counsel is an integral, vital part of due process. (*Shapiro* v. *United States*, Ct.Cl. 1947, 69 F.Supp. 205, 207; *Powell* v. *Alabama*, *supra*.) The right is so vital in our concept of justice that even proof of the prejudice in its denial need not be made with great exactitude. (*United States* v. *Venuto*, 3 Cir. 1950, 182 F.Supp. 2d 519, 522; *Glasser* v. *United States*, *supra*.)

In Petitioner's case, the time when effective assistance of counsel would have been possible was at the time he requested to call an attorney, following his arrest, and before the writing of his alleged confession (Opening Brief, p. 12, line 22 through p. 13, line 3). In refusing his request to call an attorney, the police destroyed the effectiveness of Petitioner's constitutional right of counsel.

Respondent claims concern lest this Court's finding such denial of counsel constitutes denial of due process may hamper a prosecutor who has ample direct evidence of a defendant's participation in a crime. Petitioner submits that this concern is not well-founded.

Petitioner calls the attention of the Court to the language of the California case of *People* v. *Avilez*, 86 C.A.2d 289, 194 P.2d 829:

> "Our state courts will therefore maintain this right (to counsel) absolutely and to the full extent, even when they are not forced to do so by Federal review. The protection so guaranteed is not provided by a mere 'token', 'pro forma' appearance of an attorney but *a defendant is entitled 'to the effective and substantial aid of counsel at all stages of the proceeding.'*" (Emphasis added.)

(See also: *People* v. *Lanigan*, 22 Cal.2d 569, 575, quoting with approval *Glasser* v. *United States, supra*, at 75, 76.)

The theory upholding this right of counsel is, therefore, historic and at the heart of our American traditions of liberty under law. Petitioner's contention calls for no such "sweeping declaration" as Respondent claims. Petitioner relies herein upon decisions of this Honorable Court, which hold that a defendant shall have effective assistance of counsel in all stages of a criminal proceedings against him. These decisions do not leave the way open for police to destroy this right in the investigative stage of proceedings.

Petitioner respectfully submits that this safeguard has not and will never unduly hamper state authorities, just as it has not unduly hampered federal authorities in the administration of law. In either jurisdictions, the social need of protecting this historic right of counsel is the same.

Furthermore, here, virtually the sole basis of conviction of a capital offense was an alleged confession. There was no such ample direct evidence of Petitioner's alleged participation in a crime, which would apparently be the basis of Respondent's claim of concern over the social consequences of this contention.

Petitioner's Opening Brief also sets forth substantial evidence of the careless police investigation in extremely suspicious circumstances in the testimony of certain witnesses (Opening Brief, pp. 19-21). Petitioner also testified at length, denying this crime, the specific acts written in the alleged confession, and as to the source of his knowledge of the crime being the officers' questions (Transcript of Record, pp. 159, 511-515, 520-521, 588, 595-604). The testimony of officers admits questions containing vital knowledge of the crime (Transcript of Record, pp. 74-75, 88-92, 407-409, 670-671).

Respondent contends that Petitioner has failed to discuss any such consequences of the denial of counsel as would fatally infect all regularity of the trial (Respondent's Brief, p. 57). It is submitted that the entire question here presented is in protest of the very consequences which resulted to the Petitioner by the deprivation of this right. (*United States* v. *Venato*, 182 F.Supp. 2d 519, 522.)

It is further submitted that requiring police respect for an accused's right to have assistance of counsel, particularly when requested by the accused, in the investigative stage of proceedings is consistent with both federal and state constitutions, decisions of this Court relied upon herein, and the proper administration of law enforcement. To require such respect for this right of counsel prevents just such over-zealous prosecutions as in the instant case, based by the police upon the wilful and deliberate disregard by the police of such fundamental rights of due process

essential to our concept of justice. Here, it will prevent the taking of Petitioner's life without due process of law, as a direct result of refusal by police of his constitutional right of counsel, which he requested while in their custody.

(2) This Defendant Was Denied Due Process of Law Under the Circumstances of This Case by the Admission Into Evidence of the Confession Made by Him While He Was in Custody and Was Not Allowed to Consult With an Attorney, Which He Requested to Be Allowed to Do:

For the sake of accuracy and fairness, Petitioner respectfully directs this Court's attention to the correct and complete record which shows he repeatedly, not just once, requested counsel during his interrogation by the police.

As Respondent states (Respondent's Brief, pp. 58-59), Sgt. Gotch, an interrogation officer, admitted Petitioner requested to call an attorney, named Mr. Simpson, wherein he was told he could only do so after the police investigation was over (Transcript of Record, p. 83).

In addition, using Respondent's paraphrase (Respondent's Brief, p. 35), Officer Willis, who began the conversation with Petitioner at about 6:30 p.m., testified that:

> "Either 'at that time or just when he was leaving' the defendant talked about an attorney who was a former instructor (named Mr. Simpson) '*that he thought he would like to contact some place along there*'. Willis wasn't sure whether it was 'at that time or just when he was leaving' that this was said. Willis ('*imagines*') that he 'stated it was his privilege.'" (Emphasis added.) (Transcript of Record, pp. 133, 134.)

In addition, the ruling of the trial court on People's Proposed Exhibit 29 includes in evidence everything *before*

"page 825, line 18 of the transcript" (Transcript of Record, p. 354).

Petitioner stated to District Attorney Roll in the presence of several interrogation officers of the night before: *"I'm sure that everyone here is aware of it; I just want for the record to say it, I have asked for counsel."* No refuting statement was offered by any of the interrogation officers present (Transcript of Record, p. 348).

In addition, Petitioner respectfully seeks this Court's indulgence and attention to his petition for writ of certiorari in this matter, page 5, lines 1 through 11 (Opening Brief, p. 10, lines 4 through 17), whereat Petitioner makes extended reference to the Reporter's transcript, page 1606 through page 1610, inadvertently omitted in the printing of the record. At those pages the highly significant testimony of Sgt. Hooper, an interrogation officer, pertaining to his conversation with Petitioner about his repeated requests for counsel during the interrogation of the night before, is as follows:

(WITNESS: SGT. HOOPER):

"Q. Did he say anything at that time about not wanting to answer such questions as were being posed until he had an opportunity to talk with an attorney?

"A. No, there was no discussion of an attorney. When he didn't want to answer the question he just said he would rather not answer, or rather not make a statement about that" (Reporter's Transcript, p. 1606, line 12 through p. 1607, line 21).

"Q. At any time during these periods that you have just been telling us about, did the defendant make any request for an opportunity to consult with an attorney to you?

"A. No, he never did.

"Q. Is your answer that he did not, or do you not recall that he did?

"A. He didn't make any such request in my presence or to me.

"Q. Did you ever say to the defendant at any time, 'You don't need an attorney now. The first time you need an attorney is when you go to court'?

"A. No.

"Q. Or words to that effect?

"A. No, not words to that effect. I had no discussion with him about an attorney at any time.

"Q. Well, either during this interrogation period, or directing your attention to the day of the 6th, did you ever make any such representation to the defendant that he didn't need an attorney in the investigative stages, that the first time he would need an attorney is the first time he went to court?

"Mr. Alexander: I think that is broaching upon the court's ruling" (Court's ruling above-stated on Exhibit 29).

"The Court: Objection overruled.

"The Witness: *I never had any discussion at all with the defendant about an attorney at any time.*

"By Mr. Armstrong:

"Q. If I direct your attention to the p.m. hours of the 6th of July, 1955, do you remember on that occasion at any time saying to the defendant in substance, 'You don't need an attorney in the investigative stages. The first time you will need an attorney is when you go to court.'?

"A. I didn't have any discussion with him at any time about an attorney. I don't think that I saw him in the p.m. hours of the 6th."

(The transcript of proceedings in the District Attorney's office, however, admitted in evidence for this purpose, shows the following) (Transcript of Record, pp. 349-351):

"By Mr. Hooper: I might point out one thing here, John, that this session here is an informal interview. If what you told us earlier today is true we want to go over these points so the District Attorney's Office is familiar with the case and this interview here is an informal affair and it has no particular bearing on the case. We went over it with you ourselves, both at the office and at the house and we're familiar with the facts but the District Attorney's Office is not at this time.

"John R. Crooker: I appreciate that; as you know all the way along since this investigation started I have attempted to get counsel; I have asked when I could have counsel, when I could make approaches to get counsel and I appreciate the fact that *this is reiteration of what I have already said but my interest in having counsel is the same as it has been* and I will, of course, be anxious to have counsel and I have been.

"By Mr. Hooper: In this interview, John, it doesn't serve any purpose except to acquaint the District Attorney's Office with the case. The counsel, which I agree you should have one but the first time your counsel would appear would be at your arraignment: *unless you're permitted a hearing, you don't need a counsel in a case like this.*" (Emphasis added.)

(When confronted with this impeaching testimony, Sgt. Hooper testified as follows) (Reporter's Transcript, p. 1609, line 15 through p. 1610, line 5):

"By Mr. Armstrong:

"Q. Mr. Hooper, I will ask you if you recall making this statement in the District Attorney's Office on the afternoon of July 6, 1955:

'In this interview, John, it doesn't serve any purpose except to acquaint the District Attorney's Office with the case. The counsel, which I agree you should have one but the first time your counsel will appear would be at your arraignment; unless you're permitted a hearing, you don't need a counsel in a case like this.'

Did you say those words?

"A. I may have said that. I didn't recall at the time, but I possibly said that, yes. That was in the District Attorney's Office?

"Q. I'm asking you.

"A. I think I may have said that in the District Attorney's Office."

It must be noticed that in addition to this impeaching testimony of Sgt. Hooper, none of the other officers who had interrogated Petitioner the night before, present in the District Attorney's Office, made any refuting statement whatsoever to Petitioner's statement: ". . . *as you know all the way along since this investigation started I have attempted to get counsel; I have asked when I could have counsel . . .*" (Transcript of Record, p. 350).

Respondent disregards other evidence, as above stated and relies upon the testimony of the West Los Angeles jailer, who only saw Petitioner after his alleged confession, and testified that he asked him if he wanted to call an attorney, and that Petitioner said he had no attorney to call (Respondent's Brief, p. 54) (Transcript of Record,

p. 245); in the fact of other officers testifying that Petitioner wanted to contact Mr. Simpson, a Long Beach attorney, his former instructor; and this jailer further testifying that he had told the interested officers that he "never heard him ever once say anything about that, about a request for an attorney" (Transcript of Record, p. 245), and further testifying that Petitioner had "told" his sister in the East not to come out concerning his arrest (Transcript of Record, p. 253), when all other testimony establishes that he had had no opportunity to have telephoned anyone, much less a sister in the East!

In addition, as set forth (Opening Brief, p. 6 through p. 8) Mr. Raymond C. Simpson, the attorney to whom Petitioner referred and with whom he eventually was allowed to speak, in the District Attorney's Office, with Mr. Roll monitoring the telephone conversation, and with several interrogation officers present, came forward to testify in Petitioner's behalf pertaining to his need and previous requests for counsel (Transcript of Record, p. 222 through p. 227).

Petitioner submits that these admitted facts clearly show he repeatedly, not just once, requested counsel throughout the fourteen hours of his interrogation before the writing of the alleged confession.

Respondent states that Petitioner suggests in his Brief that the only purpose of access to counsel in the instant case was for the purpose of assisting in the fabrication of facts (Respondent's Brief, p. 67). This, of course, was illustrative of the callous disregard for the right to counsel that Respondent takes and that the prosecution took at all stages of this case. This attitude of the Respondent is illustrated further by Respondent's statement, "Respondent cannot conceive what information an attorney could have given him of which he had not already evidenced

knowledge" (Respondent's Brief, p. 66). In presenting this argument, Respondent seems to be conceding the denial of counsel and at the same time asserting that a denial of counsel if of no consequence because the prosecution did not consider it to be important. If such were to be the criteria of a prisoner's right to counsel and a District Attorney's Office had no more regard for a prisoner's right than the District Attorney did in the instant case, it would be difficult to imagine a case where the prosecution would find it necessary for a prisoner to have counsel.

Advice of an attorney in criminal proceedings is, in the first place, a constitutional right. An accused's need of such assistance of counsel is well-recognized as inherent in the nature of such proceedings. Petitioner is not required to show an extraordinary need, but, moreover, the peculiar dilemma confronting him at the time he requested to call an attorney is clearly shown by his testimony at trial (Opening Brief, p. 12, line 22 through p. 13, line 3).

Petitioner not only testified that his need of counsel was for the protection of the deceased Norma McCauley (Respondent's Brief, p. 59), he testified he needed to talk with an attorney before he told "what he knew about her" (Transcript of Record, p. 623). He testified to his belief of the abortion which Norma McCauley disclosed to him on June 22, and again referred to on July 3 and 4 (Transcript of Record, pp. 508-509). He testified to his meeting and conversation, *by prearrangement*, on July 3 and 4, the morning before the crime, with Norma McCauley in her home, wherein she disclosed that someone was threatening her (Transcript of Record, pp. 471-472, 483-488); This was when the fingerprint was made, and which could not be established in time within five days (Respondent's Brief, p. 12) (Transcript of Record, pp. 503, 366); and he testified as to his whereabouts on July 4 and 5, the date of the crime (Transcript of Record, pp. 488-495, 588). These

were the intimate "details" involving his relationship with the deceased, which Petitioner testified he wanted to discuss with an attorney before divulging them.

Certainly, it is not only conceivable, but entirely reasonable that an attorney could have *advised* Petitioner to divulge those "details," no matter how intimate, if it appeared to do so might aid the investigation. An attorney could have resolved this dilemma confronting Petitioner. At least, an attorney could have *advised* Petitioner against the making of what he knew to be a "semblance of confession" (Transcript of Record, pp. 600, 588), having the evidenciary knowledge to so advise.

Respondent attempts to make much of Petitioner's educational background (Respondent's Brief, pp. 4, 66). It is noticed in passing, Petitioner had to repeat the beginning first year law courses, the extent of his training in law (Transcript of Record, pp. 528, 529). He had had "very, very little" training in such matters relating to evidence (Transcript of Record, p. 611), as every attorney may attest from his own first year of training. Advice of counsel would have been based upon competent knowledge and experience in such matters as rules of evidence.

Certainly, then, Petitioner's peculiar need of counsel was entirely undiminished by virtue of his extremely limited training in law, *and his constitutional right to the effective assistance of counsel absolutely undiminished.*

Refusal of Petitioner's request for counsel, which was repeatedly made, not just once, was *not* the only evidence of the coercive means used to extract the alleged confession. Respondent apparently has a gross misimpression of the record (Respondent's Brief, p. 59).

To comply with due process, lip-service testimony of the persons obtaining the confession, that the same is volun-

tary, is not sufficient, if the surrounding circumstances throw doubt upon its authenticity. (See *People* v. *Thomilson*, 400 Ill. 555, 81 N. E. 2d 434, 441; Cf. Syllabus, *State* v. *Cooper*, 67 A. 2d 298, 299, 2 N.J. 540; *Lyons* v. *Oklahoma*, 322 U.S. 596, 64 S.Ct. 1208, 1212.)

As set forth above, Petitioner repeatedly requested counsel, and was refused by the interrogation officers, which is submitted as being inherently coercive.

On the question of physical coercion, the officer accused of striking and threatening Petitioner did deny the accusation made at trial. However, it is significant to notice, this is the same officer, Sgt. Hooper, who denied any conversation or knowledge whatsoever about Petitioner's requests for counsel, until he was called to admit otherwise, as stated hereinabove, by his *recorded statements* in the District Attorney's Office (Transcript of Record, pp. 349-351). Similarly, the evidence of his tacit admission of his use of physical coercion, i.e. "*I Don't Think We Hurt You*" (Transcript of Record, pp. 213, 214) (Opening Brief, p. 10, line 18 through line 26), controverts his own testimony at trial. Neither Sgt. Hooper at trial, nor any of the officers present in the District Attorney's Office at the time of this accusation and this tacit admission, offered any denial of its having been made and it stands unrefuted.

This, in effect, corroborated Petitioner's testimony that such coercion was used. It must be noticed that where any physical force is present, "there is no need to weigh or measure its effect upon the will of the individual victim." (*Stein* v. *New York*, 346 U.S. at 182, 73 S.Ct. 1077.)

There is clear, undisputed evidence of the use of psychological coercion. Petitioner was in constant company of his interrogators for fourteen hours, until 3:30 in the morning following his arrest before the writing of his alleged

confession was completed (Transcript of Record, pp. 126, 113).

This fourteen hours is a period of prolonged interrogation. He was held at his residence for about three hours (Transcript of Record, pp. 126, 68), where there was some questioning (Transcript of Record, pp. 670, 673, 683). He was held at Central Station for about four and one-half hours (Transcript of Record, p. 69), where the conversation began at about *6:30 p.m.* (Transcript of Record, p. 133), in which several officers participated (Transcript of Record, pp. 83, 85-86, 103, 133). He was held at West Los Angeles Station, before the writing of the alleged confession, for about five hours (Transcript of Record, pp. 87, 113), where he was questioned by a group of officers (Transcript of Record, pp. 72-77, 88-92, 109-112, 119).

He continuously denied accusations of the crime (Transcript of Record, pp. 88-89, 74-75); and he continuously expressed to the officers his unwillingness to answer questions (Transcript of Record, pp. 110-111, 111-119, 268); while it is admitted he asked to call an attorney (Transcript of Record, pp. 83, 134); and there was no indication that this fourteen hour interrogation would end, unless Petitioner would make some statement (Transcript of Record, pp. 511, 512).

He expressed his fear of his interrogators to Lt. Armstrong (Transcript of Record, p. 215), to Mr. Simpson in the officers' presence (Transcript of Record, pp. 221-227), and to Deputy District Attorney Alexander (Transcript of Record, p. 233).

The record indicates absolutely no previous experience on Petitioner's part in such police methods.

These above facts clearly encompass the elements of psychological coercion recognized by this Court. (*Ash-*

craft v. *Tennessee*, 322 U.S. 143, 150; *Leyra* v. *Denno*, 347 U.S. 596; *Fikes* v. *Alabama*, 352 U.S. 191, 77 S.Ct. 281.)

With such admitted facts, before this Court, Petitioner respectfully submits that incorrect interpretation is placed upon the decisions of this Court cited by Respondent (Respondent's Brief, pp. 60, 61, 62, 63, 64, 65).

In *Lisenba* v. *California*, 314 U.S. 219, 62 S.Ct. 280, there were no such admitted facts of defendant's request and refusal of counsel, tacit admission of the use of physical coercion, or undisputed evidence of psychological coercion, directly affecting the making of a confession, as in Petitioner's case. There, substantial conflict did exist in the evidence as to voluntariness of a confession.

Similarly, in *Stroble* v. *California*, 343 U.S. 181, 72 S.Ct. 599, defendant did not himself request counsel, or indicate any desire for counsel. There, defendant was not making a statement reluctantly; he continued to confess even after conferring with an attorney.

In *Lyons* v. *Oklahoma*, 322 U.S. 596, 64 S.Ct. 1212, the voluntariness of one of defendant's confessions upon which conviction was based was not even contested.

Respondent also places great reliance upon the case of *Stein* v. *New York*, 346 U.S. 156, 73 S.Ct. 1077 (Respondent's Brief, pp. 55, 65, 67, 68, 73). There, defendants were seasoned malefactors, experienced in the ways of crime and methods of police. Defendant Stein bargained with the authorities for his confession. There, a prosecutor did have ample, and in fact abundant direct evidence, without the confession. Nor were there any such admitted facts of request and refusal of counsel, tacit admission of physical coercion, or undisputed evidence of psychological coercion, as in the instant case.

Respondent does not account for the distinguishing facts of the instant case, which are *not* in conflict. Not only is there the tacit admission of Petitioner being struck and threatened, and undisputed evidence of psychological coercion, but, here, Petitioner was not only uncounseled; he requested to call an attorney and was told he could not do so until the police were through with him.

As this Court did say in *Lyons* v. *Oklahoma, supra,* 322 U.S. 596, 64 U.S. 1208:

> "The voluntary or involuntary character of a confession is determined by a conclusion as to whether the accused, *at the time he confessed,* is in possession of 'mental freedom' to confess or to deny a suspected participation in a crime. When conceded facts exist which are irreconcilable with such mental freedom regardless of the contrary conclusion of the triers of fact, whether judge or jury, this court cannot avoid responsibility for such injustice by leaving the burden of adjudication solely in other hands." (Emphasis added.)

The continuing portion of the Court speaking in the *Lyons* case, *supra,* cited by Respondent (Respondent's Brief, p. 63), does not apply in the instant case, *because there is not substantial dispute as to the acts of coercion upon which Petitioner relies,* as set forth hereinabove.

Petitioner contends that when an accused himself requests counsel it appears manifest that he lacks that required "mental freedom" for a confession to be deemed voluntary. By requesting counsel he shows his need of counsel and his lack of mental freedom. Moreover, the peculiar dilemma confronted Petitioner, as regards the intimate details from his relationship with the deceased Norma McCauley when accused of responsibility for her death,

further emphasizes his lack of that "mental freedom". Thus, the police refusal to allow him to consult with an attorney, when he requested to do so, was coercive.

Respondent complains at Petitioner's citing of the case of *Fikes* v. *Alabama, supra*, 352 U.S. 291, 77 S.Ct. 281 (Respondent's Brief, p. 66). Respondent again calls attention to Petitioner's educational background, attempting to differentiate a principle of law on the basis of defendant Fikes, an uneducated person, and this background of Petitioner.

The distinguishing facts are that Petitioner was not only uncounseled, but he requested to call and consult an attorney and was told by the police he could not do so until the investigation was over. Only after fourteen hours in such circumstances, with no sign of termination, did he write an alleged confession. These admitted facts, added to the tacit admission of physical coercion, and undisputed evidence of psychological coercion, show the even more serious deprivation of constitutional rights than in the *Fikes* case, *supra*.

It is Petitioner's contention that the instant case is a stronger case than the *Fikes* case for the reason that the Petitioner, with his educational background and conceited mental superiority over the defendant Fikes, had reason to believe that police officers in an enlightened community, such as Los Angeles, would respect a citizen's rights. The callous disregard of the police officers for these rights would lead such a person as the Petitioner to have greater fear and apprehensions than would a person who is informed as to rights and had no reason to expect law abiding conduct.

It must be conceded, however, the record is voluminous. Some further pertinent facts may serve to show wherein the misimpression of much admitted facts have arisen.

Respondent attributes the following as testimony of Sgt. Gotch (Respondent's Brief, p. 33):

> "From the time Sgt. Gotch came into the defendant's room in the early afternoon until he left him after eleven o'clock, he never heard the defendant say he would like to call an attorney" (Transcript of Record, pp. 105-106).

The witness testifying at these pages, however, is not even Sgt. Gotch, but Officer Stambler who is testifying as to what he reputedly did not hear (Transcript of Record, pp. 105-106). As for Sgt. Gotch, his testimony admits Petitioner requested to call an attorney wherein he was refused (Transcript of Record, p. 83).

Respondent quoted this above misimpression verbatim from Respondent's Brief in the court below at page 20:

Respondent states (Respondent's Brief, p. 31):

> "Lt. Armstrong's best recollection is that the first time he heard that the defendant would like to call an attorney was in Mr. Roll's office the next day, following the confession, he did not hear the defendant ask for an attorney in his presence before that time" (Transcript of Record, pp. 75, 76).

Respondent does not add, however, the significant fact that Lt. Armstrong did not refute Petitioner's statement at that time in Mr. Roll's office, to wit: " . . . as you know, all the way along since this investigation started, I have attempted to get counsel, I have asked when I could have counsel . . . " (Transcript of Record, p. 350). Nor does Respondent add the significant fact that, although the above statement was *wire-recorded* in the office of the District Attorney of the County of Los Angeles, Lt. Armstrong chose not to use available equipment to record the interro-

gation of Petitioner in his office the night before (Transcript of Record, pp. 237, 238).

Instead, Respondent has again quoted verbatim from Respondent's Brief in the court below at page 17, without those significant additional facts.

Respondent states (Respondent's Brief, p. 29):

> "Officer Gravante first saw defendant at approximately 10:30 p.m., July 5, 1955, at West Los Angeles Station. . . . He next saw him at approximately 1:15 a.m., on July 6th . . . with four other officers . . . ."

Respondent does not add, however, the fact that at least two of these "other officers" testified that Officer Gravante questioned Petitioner continued during the 11:00 to 12:30 period with them (Transcript of Record, pp. 72, 72, 108) *not* the 1:15 period as Sgt. Gravante testified was the "next" he was Petitioner. The significance is that such discrepancies in the testimony of these officers renders particularly suspect their lip-service testimony that the alleged confession was "free and voluntary" in the coercive circumstances of this case.

Again, Respondent has quoted verbatim from Respondent's brief in the court below at page 15, without these irreconcilable additional facts.

Similarly, Respondent states (Respondent's Brief, p. 32):

> "Officer Gotch did not know the cause of Norma McCauley's death up to the time that Exhibit 18 was completed, and did not learn of it, aside from the confession of defendant, until sometime on July 6th after completion of the autopsy" (Transcript of Record, pp. 96-97).

However, the facts were that Sgt. Gotch directed removal of the body from the scene, on the morning of July 5th, and observed the body was "covered with blood" (Transcript of Record, pp. 99, 100) (and also directed detailed photographing of the body at the scene, Reporter's Transcript, pp. 291-298); and that Captain Stilson, of the police crime lab, who was with Sgt. Gotch, both at the scene and at Petitioner's residence at that time, testified that, "*We were looking for any sharp weapon that might have been used in the crime that we had come from*" (Transcript of Record, p. 408).

The significance of this testimony is that Petitioner testified the officers' questions were the source of his knowledge of the crime (Transcript of Record, pp. 157, 159). In addition, Lt. Armstrong admitted Petitioner was asked about a "*knife*", and about "*stabbing*" and killing the deceased, and about being in the home on the date of the crime (Transcript of Record, pp. 75, 76).

It is apparent that with such omissions and with such voluminous record, a court may be subject to receive such a misimpression of the admitted facts or record, not in conflict. Petitioner submits that this is apparently what occurred in the court below, in spite of his earnest efforts to clarify these facts. Thus, Petitioner respectfully directs attention to the record, as set forth hereinabove, in order to remedy such a misimpression.

As Petitioner contends in his Opening Brief (Opening Brief, p. 11, lines 20-25), this Court is not bound by the conclusions of the judge or jury or the court below as to such admitted circumstances as in this case, which are irreconcilable with a voluntary confession, and demand that an alleged confession in such circumstances be deemed to have been coerced and therefore was inadmissible.

(*Ashcraft* v. *Tennessee, supra,* 322 U.S. 143, 64 S.Ct. 921; *Lyons* v. *Oklahoma, supra,* 322 U.S. 596, 64 S.Ct. at 1212.)

The record before this Court shows that the testimony and other evidence in the voir dire inquiry at trial established the facts, not in any substantial conflict, that Petitioner requested to call and consult an attorney, Mr. Simpson, following his arrest at his residence, without warrant, on July 5, 1955, a regular business day; and that the police told him that he could not call his attorney until after their investigation was over, which extended continuously for fourteen hours into the early morning hours, until after Petitioner wrote an alleged confession of the murder of the deceased, Norma McCauley. The record discloses abundant evidence, as set forth hereinabove, from which it must be concluded that he repeatedly, not just once, sought such assistance of counsel before this alleged confession was written.

On the basis of such admitted facts of denial of his constitutional right of counsel, and evidence of the tacit admission of the use of physical force, by the accused officer, Sgt. Hooper, and the undisputed evidence of elements of psychological coercion, Petitioner objected to the admission of the alleged confession into evidence (Transcript of Record, pp. 278-300). Nevertheless, this alleged confession was submitted in evidence to the jury (Transcript of Record, p. 300).

Upon conclusion of the evidence, Petitioner then requested that the jury be instructed to "absolutely disregard" this purported confession, upon proof of the facts of this denial of counsel (Opening Brief, p. 15, lines 3-12).

The trial court rejected and modified the Instruction as requested, instructing the jury, instead, that these facts of the denial of requested counsel were only "circumstances you *may* consider" in determining whether the alleged con-

fession was voluntary or involuntary (Opening Brief, p. 15 through p. 17, line 4).

The only significant and equivocal evidence linking the defendant with this crime was the alleged confession, surrounding which there were extremely suspicious circumstances, as set forth hereinabove, and in his Opening Brief (Opening Brief, p. 19 through p. 21).

The California Supreme Court in the opinion affirming Petitioner's conviction made reference to the fact that Petitioner had requested counsel in only one instance (*People v. Crooker*, 57 Cal. 2d 348, 303 P. 2d 753, Transcript of Record, p. 714), and held other evidence of coercion to have been in conflict (Transcript of Record (Opinion below) 713). Thus, the court below apparently received the misimpression of the record, as set forth hereinabove. On this basis, the court affirmed the conviction, with Mr. Justice Carter dissenting.

No such compelling admitted facts were before the court in *Rogers v. Superior Court*, 46 Cal. 2d 3, 10, 291 P. 2d 929, cited by Respondent (Respondent's Brief, p. 68). In the instant case we do not find a "mere detention and police examination", or mere delay in an arraignment, as in *Brown v. Allen*, 344 U.S. 443, 73 S.Ct. 397, 417, cited by Respondent (Respondent's Brief, p. 69). Here, the admitted facts present far more than a "lack of counsel" as a coincidental part of prolonged interrogation, as in *Gallegos v. Nebraska*, 342 U.S. 55, 63-65, 72 S.Ct. 141, 146-147, cited by Respondent (Respondent's Brief, pp. 70, 71).

In none of these cases relied upon by Respondent was there evidence that defendants admittedly requested counsel; in none of these cases do we find a defendant admittedly and overtly being told by police he could not call and obtain advice and assistance of an attorney until the police were

through with him; such as are the admitted facts, not in substantial conflict, in the case now before this Court.

As this Court did say in *Stroble* v. *California*, 343 U.S. at 197 and 198:

> "As to the refusal of the prosecutors to admit counsel during their interrogation of Petitioner, counsel stated that he had come to the District Attorney's office at the request of Petitioner's son-in-law *merely to inquire of Petitioner as to his guilt. At no point did Petitioner himself ask for counsel.* In the light of these facts, the District Attorney's refusal to interrupt the examination of Petitioner, which had been proceeding for almost an hour, so that counsel could make inquiry for Petitioner's son-in-law, does not constitute a denial of due process . . . " (Emphasis added.)

Now, this Court is presented with a fact situation which this language indicates was contemplated in review of the *Stroble* case, *supra*.

Here, the admitted facts, not in substantial conflict show the coercive circumstances of incommunicado police interrogations condemned in *Ashcraft* v. *Tennessee*, *supra*; *Leyra* v. *Denno*, *supra*; *Chandler* v. *Fretag*, *supra*; *Fikes* v. *Alabama*, *supra*; and relating to *Williams* v. *North Carolina*, 317 U.S. 287; and *Stromberg* v. *California*, 282 U.S. 29, cited (Opening Brief, p. 18, lines 20-30) as concerns the alleged confession as virtually the sole basis of conviction.

Here, Petitioner did himself repeatedly request to call and consult an attorney during his interrogation by police, and, moreover, he had a particular good faith and real need of such counsel at that time.

As this Court said in the *Glasser* case:

> "The right to have assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice existing from its denial."

(*Glasser* v. *United States*, *supra*, 315 U.S. 60, 62 S.Ct. 457; *People* v. *Robinson*, 42 Cal.2d 741, 745, 746.)

The decisions of this Court, following *Powell* v. *Alabama*, *supra*, have continued to uphold this right of counsel in various stages of criminal proceedings. (Cf. *Chessman* v. *Teets*, 77 S.Ct. 1356; *Moore* v. *Michigan*, *supra*, No. 42, 355 U.S. ——, 26 N.W. 4023.)

Such police refusal of an accused's request to call and have assistance of counsel, as in the circumstances of Petitioner's case, in the *investigative stage* of criminal proceedings, fatally infects all stages of the proceedings. Here, such police refusal destroyed the effectiveness of Petitioner's right of counsel at all stages of the proceedings against him, under the Fourteenth Amendment of the Federal Constitution.

On the basis of the foregoing, Petitioner respectfully submits that his conviction constitutes a deprivation of his constitutional rights of due process of law and demands reversal by this Honorable Court.

Respectfully submitted,

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